Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# In the Supreme Court

OF THE

## United States

OCTOBER TERM 1978

No. 78-845

RAYMOND J. PENOLI, JR.
*Petitioner,*

vs.

THE STATE OF CALIFORNIA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI**
**to the Court of Appeal of the**
**State of California**

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November 21, 1978.

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# In the Supreme Court

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**No.**

RAYMOND J. PENOLI, JR.
*Petitioner,*

VS.

THE STATE OF CALIFORNIA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI**
**to the Court of Appeal of the**
**State of California**

Petitioner, Raymond Joseph Penoli, Jr., prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, entered June 28, 1978, affirming his conviction under California Penal Code Section 459 (auto burglary), and that on hearing the judgment of conviction be reversed.

### OPINIONS BELOW

An unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, affirming the conviction of the Defendant is attached hereto as Appendix C.

The Order of the Court of Appeal, in postcard form, denying Defendant's Petition for a Rehearing is also at-

tached hereto as Appendix B. The Judgment of the California Supreme Court denying Defendant's Petition for a Hearing in that Court is attached hereto as Appendix A.

## JURISDICTION

The judgment of the Court of Appeal was entered June 28, 1978. A timely Petition for Rehearing was filed, and was denied on July 26, 1978. This judgment of the Court of Appeal became final on July 28, 1978. A timely Petition for Hearing was filed in the California Supreme Court, and was denied on August 24, 1978. This judgment of the California Supreme Court became final on August 28, 1978. This Court has jurisdiction under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether, in light of *United States v. Chadwick* (1977) 433 U.S. 1, it is a violation of the Fourth Amendment for police to conduct a warrantless search of a locked trunk of an impounded automobile when probable cause exists to believe the trunk contains contraband, but there are *no* exigent circumstances justifying an immediate, warrantless search, and a search warrant could readily be obtained.

2. Whether the "instrumentality" doctrine adopted by California allowing warrantless searches of automobiles or other objects in their entirety which are themselves "evidence" of the commission of a crime is a violation of the Fourth Amendment.



## CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## STATEMENT OF THE CASE

On October 14, 1976, the District Attorney of San Luis Obispo County filed a complaint against Petitioner and a Co-Defendant named Thomas Decker charging them with one count of auto burglary (California Penal Code Section 459) and one count of receiving stolen property (California Penal Code Section 496). A preliminary examination was held on these charges on February 3, 1977, at which time the testimony and evidence introduced revealed the following facts:

On October 10, 1976, at approximately 10:00 a.m., Mr. Warren Davey, a resident of Santa Barbara County, walked out onto the balcony of his second floor motel room in Shell Beach and noticed a white Cadillac El Dorado with a black top parked behind his 1970 Lincoln automobile. The right front door of the Cadillac was open opposite the trunk of Davey's car and the Co-Defendant Decker was standing between the two (2) cars, his hands in the vicinity of the trunk lid which was opened about four (4″) inches.

As Davey looked on, Decker glanced up at him standing twenty (20′) feet above and then turned around and

starting talking to Petitioner Penoli who was seated inside the white Cadillac and, at the same time, Decker, sat on the trunk of Mr. Davey's automobile, closing the trunk lid. After briefly speaking with Penoli, Decker walked directly from Mr. Davey's car to the white Cadillac and got in on the passenger's side. Mr. Davey did not see either of the Defendants place anything into the trunk of the Cadillac nor even go near the area of the trunk while the Cadillac was parked in the lot. After Mr. Decker entered the Cadillac, the Defendants drove out of the parking lot and down the street across from the motel. Davey then checked the contents of the trunk and discovered his camera and his camera case, his wife's coat and an overnight case were missing. He had locked these items in the trunk of his car the night before.

Davey telephoned the local police and reported that he believed someone had gotten into the trunk of his car and taken his camera case and that the responsibles were two (2) men in a white Cadillac El Dorado with a black top.

Upon receiving this information from Mr. Davey, the Pismo Beach Police Department broadcasted a "Be on the lookout notice" indicating that a "black over white Cadillac . . . had just been involved in a 459 auto at Spyglass Motel in Shell Beach." The broadcast also indicated that the occupants of said Cadillac were "two white male subjects, one with light-colored hair". At approximately 10:30 a.m., Officer Griffith, a reserve police officer for the Pismo Beach Police Department, observed a black over white Cadillac proceeding southbound on Price Street. Inside the Cadillac were two (2) male occupants, one (1) of which, the driver, had light-colored hair. Officer Griffith radioed for back-up



assistance from Officer Holt and then followed the Cadillac onto Highway 101. After following the Cadillac for approximately a mile and one-half (1½), Officer Griffith stopped the vehicle and ordered Decker, who was driving, to get out of the vehicle and step to the rear of the Cadillac. At this time Officer Holt arrived at the scene and alerted the police dispatcher to summon the victim, Davey, to the location. Approximately five or ten (5-10) minutes later Davey arrived, identified himself to Officer Holt, and related the activities of the Defendants that he had observed from the second floor motel room. Mr. Davey also told Officer Holt that he had not seen the Defendants take anything out of the trunk of his automobile nor had he seen them put anything into the trunk of their Cadillac.

Immediately after talking with Mr. Davey, Officer Holt placed both Defendants under arrest for burglary, at which time they were handcuffed and placed in separate police vehicles. A search of the interior of the Cadillac at the scene of the arrest produced no contraband or stolen property. Thereafter, Officer Holt asked Mr. Davey to come down to the police department and give a written statement concerning the incident. Officer Holt made no attempt at that time to determine Mr. Davey's residence nor how long Mr. Davey would be in town. At no time did any police officer ask Mr. Davey to sign an affidavit for a search warrant.

Following their arrest, the Defendants were transported to the jail for identification and booking and the white Cadillac was taken to a service station in the City of Pismo Beach and impounded. Approximately one hour later, Officer Holt caused the locked glove compartment and trunk

of the Defendants' vehicle to be forced open by a locksmith. At the time the trunk was forced open, the Defendants were in custody at the jail and were in the process of being booked. The white Cadillac itself had been "impounded" and could not have been released to anyone nor removed from the service station without the express permission of Officer Holt. Mr. Davey was still available to sign an affidavit for a search warrant but nothing was requested of him. In addition, a magistrate was available for the purposes of signing a search warrant had one been requested, and a District Attorney was available to help in the preparation of an affidavit for a search warrant had one been requested by Officer Holt. No attempt was made, however, to obtain a search warrant for the search of the locked glove compartment or trunk. A search of the trunk produced the evidence supporting the conviction of Petitioner for auto burglary.

Based on the foregoing facts, Petitioner moved at the preliminary examination to suppress the evidence seized from the locked trunk on the grounds that the warrantless search violated the provisions of the Fourth Amendment. This motion was denied and the Defendants were held to answer to the Superior Court.

On May 2, 1977, Defendants filed in the Superior Court a motion for a hearing *de novo* on the validity of the warrantless search of the locked trunk of the automobile. On May 20, 1977, the motion was submitted on the transcript of the Preliminary Examination, argued, and denied.

On June 10, 1977, the Defendants withdrew their previously entered pleas of not guilty and entered pleas of guilty to one (1) count of auto burglary (Penal Code Section



459). In addition, it was stipulated by the prosecution and defense that the evidence supporting such charge was the physical evidence seized from the locked trunk of the automobile following the warrantless search. The Defendants appealed their convictions under California Penal Code Section 1538.5(m) which allows appellate review of suppression motions even though a plea of guilty is the basis for the conviction.

On June 21, 1977, this Court issued its opinion in *United States v. Chadwick* (1977) 433 U.S. 1 holding that the warrantless search of a locked, impounded footlocker reasonably believed to contain contraband was a violation of the Fourth Amendment in the absence of exigent circumstances. This case was not relied upon by Petitioner in his pre-trial suppression motions because it had not yet been issued. Petitioner did, however, cite and rely upon this authority in his briefs submitted to the California Court of Appeal and the California Supreme Court.

Petitioner seeks review of the affirmance of his conviction and requests an outright reversal thereof.

## REASONS FOR GRANTING THE WRIT

1. This case presents an important question of the law of search and seizure that should be resolved. In *Carroll v. United States* (1925) 267 US. 132, this Court announced the rule that law enforcement officers may, because of the inherent mobility of an automobile, make a warrantless search of a vehicle stopped on the highway, given probable cause to believe the vehicle contains contraband. Since that time, although the so-called "automobile exception" to the warrant requirement has been expanded greatly, this

Court has also lent greater recognition to the importance of an individual's right to privacy upon the grounds that the Fourth Amendment "protects people, not places." *Katz v. United States* (1967) 389 U.S. 347, 351.

Based upon this recognition of a right to privacy, this Court held in *United States v. Chadwick* (1977) 433 U.S. 1 that a warrantless search of a locked and impounded footlocker was unlawful. Although this protection was not extended to automobiles because of a "diminished expectation of privacy", the actual issue was apparently not before the Court. Petitioner submits, however, that individuals do have the same expectation of privacy concerning locked areas of their cars as they do their luggage. Vehicles have, in the modern life style of the average American, become irreversibly intertwined with his daily and personal activities as well as the repository for personal effects. People today spend a great deal of time in their vehicles, not only driving from place to place, but in performing various activities along the way or upon reaching their destinations. Cars are often used for private activities, and drivers put items in the closed-off areas of the car to keep them secret. Using the car as a protected container, under lock and key, is general in American society. Thus, a search thereof is an invasion of the social expectation of secrecy, just as a seizure is an invasion of the expectation of control.

In addition, Petitioner submits that there are no differences whatsoever between the locked trunk of an automobile and a locked footlocker once either of these items has been impounded by police authorities. For example, both the exterior of the car and the exterior of the footlocker are open to public view and yet both are secured by locking devices to maintain the integrity of their contents. Once an automobile has been impounded in police custody it has no more mobility than the motorless footlocker. Unless true exigent circumstances exist for an immediate search (explosives, bodies, evidence that will deteriorate in a short space of time, etc.), Petitioner submits that a warrant should be obtained before conducting the search. Obviously, no such urgency was shown in the instant case because *both* of the occupants of the vehicle had been arrested and were in custody at the police station, there were no unaccounted for suspects, the car was in police custody, and there was no reason to believe that the trunk contained explosives or evidence that might deteriorate if not reached immediately.



2. In California, it has been held that a vehicle about to be used to flee the scene of a crime is an instrumentality of the crime. *People v. Laursen* (1972) 8 Cal.3d 192. The present case serves as a further illustration of the manner in which the instrumentality doctrine is applied in California. The vehicle in this case was seized as a getaway car; the District Court of Appeal, citing *People v. Laursen, supra,* reasoned that the vehicle was an instrumentality of the crime and thus the police were "entitled to conduct an immediate warrantless search of all areas of the car."

The instrumentality doctrine as developed in California, however, cannot be reconciled with this Court's decision in *United States v. Chadwick, supra.* Otherwise, the vehicle in *Chadwick* could have been characterized as an instrumentality of a crime, so that the vehicle together with its contents, including the locked footlocker, would have been subject to a warrantless search. But in the instrumentality situation, as in the probable cause situation, one still has a

reasonable expectation of privacy in his automobile and its contents. It is the privacy interest in, and not the *use* made of, the automobile which should be the critical factor in determining whether police may subject the vehicle and its contents to a warrantless search. The instrumentality doctrine ignores this element of privacy, focusing exclusively on the use made of the vehicle. This Court should therefore repudiate this ill-conceived doctrine because it does not, indeed cannot, protect persons from unreasonable governmental intrusion into their legitimate expectations of privacy with regard to automobiles and their contents. The fact that a vehicle may be tenuously connected to the arrest of the Defendants and the crime should not be used as a circumstance to swallow up the mandate of the Fourth Amendment under the pretext of an "exception" to the provisions of that Amendment.

Respectfully submitted,

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**(Appendices Follow)**

# APPENDIX

## APPENDIX A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

August 24, 1978

I have this day filed Order HEARING DENIED

In re: 2 Crim. No. 31380

People

vs.

Decker and Penoli

Respectfully,

G. E. Bishel
Clerk

## APPENDIX B

Post Card

Clerk's Office
Court of Appeal
Second District

3580 Wilshire Boulevard
Suite 301
Los Angeles, CA 90010

Dennis M. Sullivan
One Kaiser Plaza #1115
Oakland, 94612, California

---

Los Angeles, Cal. July 26, 1978

Title

People

vs.

Decker, et al

No. 31380

The Court: Petition for rehearing is denied.

Clay Robbins, Clerk



## APPENDIX C

Not To Be Published In
The Official Reports
In the Court of Appeal of the State of California

Second Appellate District

Division Three

2d Crim. No. 31380
(Sup. Ct. No. 10226)

The People,
Plaintiff and Respondent,
v.
Thomas Leroy Decker and
Raymond Joseph Penoli,
Defendants and Appellants.

[Filed June 28, 1978]

THE COURT*

Codefendants, Thomas Leroy Decker and Raymond Joseph Penoli, pleaded guilty to second degree burglary (Pen. Code, § 459). Prior thereto they unsuccessfully moved to suppress evidence (Pen. Code § 1538.5). They appeal, contending in essence, that (1) their initial detention was illegal, (2) they were arrested without probable cause, and (3) the warrantless search of their vehicle after it was impounded was unlawful.

---

*Before Klein, P. J., Cobey, J., and Allport, J.

We review the evidence in the light most favorable to the order denying suppression as is required by the usual rule governing appellate review. (*People v. James*, 19 Cal. 3d 99, 107.) On October 10, 1976, at about 10:00 a.m. Warren Davey was standing on the second floor balcony outside of his room at the Spyglass Motel in Pismo Beach when he noticed that appellants' Cadillac automobile was parked perpendicular to the rear of his car. The right front door of the Cadillac was open opposite the trunk of Davey's car and appellant Decker was standing between the two cars, his hands holding the trunk lid which was opened about four inches.

As Davey looked on, Decker glanced up at him standing 20 feet above and immediately closed the trunk lid. After briefly speaking with appellant Penoli, who was seated behind the steering wheel of the Cadillac, they drove away. Davey then checked the contents of the trunk and discovered his camera and camera case, his wife's coat and an overnight case were missing. He had locked these items in the trunk of his car the night before.

Davey telephoned the local police and reported, "I believe someone had gotten into my trunk and taken my camera case." He described the car and its occupants as "a white Cadillac, El Dorado, with a black top and had two men inside, and one of them was six feet and light hair, light sandy hair, and the other one was roughly six feet and had dark hair." Shortly thereafter Pismo Beach Officer David Griffith received a bulletin over his police radio to "be on the lookout for a black over white Cadillac that had just been involved in a 459 auto at Spyglass Motel . . . [con-



taining] two male occupants . . . one with light-colored hair."

At approximately 10:30 a.m. Officer Griffith observed appellants in the Cadillac heading south from Pismo Beach on Interstate Highway 101. He ordered Decker, who was driving, to stop and exit the car. At this time Officer Gary Holt arrived at the scene and alerted the police dispatcher to summon the victim, Davey, to the location. Approximately five or ten minutes later Davey arrived, identified himself to Officer Holt, and make a positive identification of appellants and their car. Appellants were arrested and searched[1] and their car was impounded at a nearby gas station. One hour later Officer Holt had a locksmith open the trunk and recovered Davey's property.[2]

The contention that Officer Griffith had insufficient information to detain appellants is meritless. In the instant matter, Officer Griffith obtained knowledge through "official channels" that a burglary had taken place a short time before observing appellants on the highway. He knew the general description of the suspects and the car used by them. From this set of facts, Officer Griffith could "reasonably entertain a sufficient good faith suspicion to warrant a detention of the occupants for investigative purposes." (*People v. Flores*, 12 Cal.3d 85, 91; *People v. Waters*, 30 Cal.App.3d 354, 361.) Further, since Griffith was the first officer on the scene to confront appellants, he was justified in requiring Decker to alight from

[1]A search of Decker's jacket pocket uncovered a set of altered automobile keys used for "picking" locks on cars.

[2]The locked glove box was also opened and searched but no seizable evidence was found therein.

the car as a safety precaution. (See *People v. Ortega,* 2 Cal. App.3d 884, 892; *People v. Figueroa,* 268 Cal.App.2d 721, 726-727.)

Appellants' argument that the victim was an unreliable informant and the information he supplied was insufficient to constitute probable cause to arrest them is meritless. Prior to arresting appellants, Officer Holt had the victim, Davey, summoned to the detention location. When he arrived the victim provided Officer Holt with a detailed description of the crime and made a positive identification of the car and appellants. Mr. Davey, as a citizen-informant, is presumed to be reliable and there is nothing contained in this record to challenge his credibility. (*People v. Ramey,* 16 Cal.3d 263, 269.) We find the information supplied by Davey amply supports the court's finding that probable cause to arrest appellants existed. (See *People v. Ramey, supra,* at pp. 269, 270; *People v. Amos,* 70 Cal.App.3d 562, 566-567.)

Lastly, appellants contend that the warrantless search of their impounded vehicle was unlawful. Here appellants were stopped on the highway driving away from the city only one-half hour after the burglary was reported. Under these circumstances the officers had reason to believe appellants had not yet disposed of the stolen goods and the items were probably concealed somewhere in the car. (See *People v. Dumas,* 9 Cal.3d 871, 885.) They were then entitled to conduct an immediate warrantless search of all areas of the car. (*People v. Laursen,* 8 Cal.3d 192, 201.) The fact that the trunk was opened and searched only after appellant's car was removed from the open highway



and impounded does not invalidate the search. (*People v. Hill,* 12 Cal.3d 731, 751 and cases therein; *People v. Stafford,* 29 Cal.App.3d 940, 947.)

The judgments[3] are affirmed.

Not to be published in the Official Reports.

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[3]Appellant Decker was granted probation, an order deemed a judgment for appellate purposes. (Pen. Code, § 1237.)

Supreme Court, U. S.
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## No. 78-845

RAYMOND J. PENOLI, JR.,

*Petitioner,*

v.

THE STATE OF CALIFORNIA,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT**

**BRIEF OF RESPONDENT IN OPPOSITION**

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-845

RAYMOND J. PENOLI, JR.,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT

# BRIEF OF RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Three, received petitioner's direct appeal from a judgment of conviction. In an unpublished opinion, the court found no merit to petitioner's contentions and affirmed the judgment. (Appen. B.)

## JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

## STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

## QUESTIONS PRESENTED

1. Whether United States v. Chadwick (1977) 433 U.S. 1, indicates there is an expectation of privacy with regard to automobiles in the same manner that there would be in a locked trunk when Chadwick has nothing to do with automobile searches and does suggest that where automobiles are involved there is a lesser expectation of privacy.

2. Whether it is improper for police to conduct a warrantless search of a vehicle after it has been impounded where the police had probable cause to search the vehicle and exigent circumstances existed when the vehicle was stopped.

3. Whether California has an instrumentality doctrine justifying vehicle searches in violation of the Fourth Amendment or the doctrine is merely part of the determination of whether there is probable cause to search a vehicle.

## STATEMENT OF THE CASE

In a five count information petitioner and Thomas Decker were charged in count I with burglary (Cal. Pen. Code, § 459), in counts II-IV with concealing stolen property (Cal. Pen. Code, § 496), and



in count V with possession of burglary tools (Cal. Pen. Code, § 466). (CT 1-4.)[1]

After entering a not guilty plea, petitioner's motion to suppress evidence pursuant to Penal Code section 1538.5 was heard and denied as was a motion to dismiss the information pursuant to Penal Code section 995.[2]

Thereafter, petitioner entered a guilty plea to the charge in count I as second degree burglary. All other counts were dismissed upon motion by the prosecution. (CT 6, 61-62.) Petitioner was sentenced to state prison for the term prescribed by law, but was granted bail pending appeal. (CT 64-66.)

Petitioner appealed, and the California Court of Appeal, Second Appellate District, Division Three, affirmed the conviction in an unpublished opinion. (Appen. B.) Thereafter, a hearing was denied by the California Supreme Court. (Appen. C.)

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1. CT refers to the clerk's transcript of the proceedings before the San Luis Obispo County Superior Court. RT refers to the reporter's transcript of the proceedings. If this Court desires a copy of these transcripts, respondent would be pleased to lodge them with this Court. All references are to California Statutes.

2. It was stipulated the court could consider the preliminary hearing transcript in ruling on the motion to suppress. (CT 61; RT 109-111.) The preliminary hearing is reported at pages 2-104 of the reporter's transcript.

## STATEMENT OF FACTS

On October 10, 1976, Warren Davey was staying at the Spyglass Motel in Pismo Beach, California. He had a gold 1970 Lincoln parked by the motel. At about 10:00 a.m. he went out on the motel balcony and saw a white Cadillac El Dorado with a black top parked behind the trunk of his car. The passenger door of the Cadillac was open and right behind the trunk of Davey's car. Davey also noted the trunk of his Lincoln was open about four inches. The man standing by the cars was Decker. Decker had sandy hair, was about six feet tall, and about thirty years old.

Decker apparently saw Davey and spoke to another man inside the Cadillac. This man was Penoli. Thereafter, they drove away. Davey checked the trunk and found a camera and camera case, his wife's coat, and an overnight case were missing from the trunk. Davey had closed the trunk the night before and had locked the car. Davey called the police, told them what had happened, and indicated he had seen the white Cadillac turn right on the freeway. He indicated the Cadillac was a white El Dorado with a black top, and had two men inside. One was six feet tall and had light, sandy hair. The other suspect was six feet tall and had dark hair. (RT 4-9, 19.)

At about this same time, David Griffith of the Pismo Beach Police Department received a call indicating he should be on the lookout for a black over white Cadillac which had been involved in a "459 auto" at the Spyglass Motel. The bulletin indicated the vehicle had two male occupants. One occupant had light colored hair, and both occupants were white. Thereafter, he observed a black over white Cadillac with two male occupants



and noted the driver had light colored hair. He followed the vehicle, requested a backup, and eventually stopped the vehicle. Penoli and Decker were in the vehicle. (RT 49-53.)

Officer Holt of the Pismo Beach Police assisted in the stop of the vehicle and contacted Decker and Penoli. They denied having committed the burglary. Holt had his dispatcher contact Davey so Davey could come to the scene. Davey arrived at the scene about five to ten minutes later. This was only 25 minutes after the burglary.

Davey told Holt he had seen a man fitting Decker's description by his car and Decker and Penoli had removed property from his car. Davey said Penoli had been driving the Cadillac and Decker had been the passenger. Davey said he had seen Decker close the trunk hood on his car, get in the Cadillac, and leave the scene. (RT 63-68, 10-13, 88.) After Davey had identified Decker and Penoli, Holt arrested them for burglary. Various items which were similar to items used for picking locks were found on Decker and Penoli. (RT 68-77.)

Decker and Penoli refused to consent to a search of the Cadillac, the Cadillac was taken to a gas station, and the trunk was opened. Decker and Penoli were transported to the police station. The trunk was searched after the car had been impounded. Various items, including the property taken from Mr. Davey, were found in the trunk. The glove compartment was also searched. (RT 78-82.)

At the motion to suppress, Decker and Penoli stipulated Officer Holt had a subjective belief, whether reasonable or unreasonable, that the trunk contained contraband. (RT 110-111.)

## ARGUMENT

### I

### NOTHING IN UNITED STATES v. CHADWICK (1977) 433 U.S. 1, INDICATES THERE IS AN EXPECTATION OF PRIVACY WITH REGARD TO AUTOMOBILES IN THE SAME MANNER THAT THERE WOULD BE IN A FOOTLOCKER

Relying on United States v. Chadwick (1977) 433 U.S. 1, petitioner contends there is a right to privacy with regard to automobiles similar to that in locked trunks and police thus may not conduct a warrantless search of a vehicle. (Petn. 6-8.) This contention is without merit.

Prior to United States v. Chadwick, supra, this Court repeatedly upheld the right of the police to conduct warrantless searches of vehicles under varying circumstances. (See Carroll v. United States (1925) 267 U.S. 132, 153-154; Chambers v. Maroney (1970) 399 U.S. 42; Cardwell v. Lewis (1974) 417 U.S. 583, 589.) The rationale behind these rulings and similar rulings was that there was a different expectation of privacy with regard to automobiles and a home or office.

As this Court noted in South Dakota v. Opperman (1976) 428 U.S. 364, 367-368:

> "This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within the reach of the Fourth Amendment, Cady v. Dombrowski, 413 U.S. 433, 439 (1973), warrantless examinations of automobiles



> have been upheld in circumstances in which a search of a home or office would not. Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Cady v. Dombrowski, supra, at 439-440; Chambers v. Maroney, 399 U.S. 42, 48 (1970).
>
> "The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. Carroll v. United States, 267 U.S. 132, 153-154 (1925); Coolidge v. New Hampshire, 403 U.S. 443, 459-460 (1971). But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. Chambers v. Maroney, supra, at 51-52; Cooper v. California, 386 U.S. 58 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Cady v. Dombrowski, supra, at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection

and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

"The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:

"'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.' Cardwell v. Lewis, supra, at 590." (Footnote omitted.)

Nothing in United States v. Chadwick, supra, changed the well settled view of this Court there was a lesser expectation of privacy with regard to automobiles than offices, homes, or other items.

There, this Court merely held a footlocker could not be searched without a search warrant and noted the search could not be justified as a search incident to arrest or under a theory similar to the automobile



exception to the warrant requirement.3/ Indeed, in concluding a theory similar to the automobile exception to the warrant requirement could not be used to justify a search of a footlocker, this Court reaffirmed its prior holding justifying warrantless searches of vehicles because of the lesser expectation of privacy an individual has as to an automobile.

"But this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. Carroll v. United States, 267 U.S. 132 (1925); Preston v. United States, supra, at 366-367; Chambers v. Maroney, 399 U.S. 42 (1970). See also South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

"Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impractical. Nevertheless, we have also sustained 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent.' Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973); accord,

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3. The government never argued the search was justified under the automobile exception to the warrant requirement. (United States v. Chadwick, supra, at p. 11; see too United States v. McGrath (S.D.N.Y. 1978) 448 F.Supp. 1338, 1342.)

South Dakota v. Opperman, supra, at 367; see Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, supra; Cooper v. California, 386 U.S. 58 (1967).

"The answer lies in the diminished expectation of privacy which surrounds the automobile:

"'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.' Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

"Other factors reduce automobile privacy. 'All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.' Cady v. Dombrowski, supra, at 441. Automobiles periodically undergo official inspection, and they are often taken into police custody in the interests of public safety. South Dakota v. Opperman, supra, at 368.

"The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are



not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

"Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.[7] The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.[8]

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"[7] This may often not be the case when automobiles are seized. Absolutely secure storage facilities may not be available, see

South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973), and the size and inherent mobility of a vehicle makes it susceptible to theft or intrusion by vandals.

"[8] Respondents' principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.

"It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in Chambers unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage." (United States v. Chadwick, supra, at pp. 12-14.)

Accordingly, nothing in Chadwick supports the conclusion this Court should abandon the power of law enforcement officials to conduct warrantless searches of vehicles under varying circumstances. Accordingly, police may still conduct warrantless



searches of vehicles based upon probable cause and the existence of exigent circumstances. (See Chambers v. Maroney, supra; Carroll v. United States, supra.)

Support for our argument here may also be found in recent cases which indicate nothing in Chadwick overrules the prior decision of this Court in Chambers v. Maroney, supra, authorizing warrantless searches of vehicles based upon probable cause and the existence of exigent circumstances. (United States v. Trejo-Zambrano (9th Cir. 1978) 582 F.2d 460, 463; United States v. McLaughlin (5th Cir. 1978) 578 F.2d 1180, 1182-1183; United States v. Stevie (8th Cir. 1977) 578 F.2d 204, 208.)

Even assuming arguendo Chadwick somehow stood for the proposition asserted by petitioner, it would not assist petitioner here. The search in the instant case occurred long before the date Chadwick was decided (June 21, 1977) and it has been repeatedly held that Chadwick does not apply to searches, such as this one, which occurred before the decision in Chadwick. (United States v. Berry (7th Cir. 1978) 571 F.2d 2, 3; United States v. Choate (9th Cir. 1978) 576 F.2d 165, 182, n. 20 (U.S. appeal pending); United States v. Diaz (2d Cir. 1978) 577 F.2d 821, 824.)

Thus, petitioner's first contention is without merit.

## II

## POLICE MAY PROPERLY CONDUCT A WARRANTLESS SEARCH OF A VEHICLE AFTER IT HAS BEEN IMPOUNDED

Petitioner next contends a locked trunk of a vehicle is like the locked trunk

in Chadwick and police should thus not be permitted to search the trunk of a vehicle after it has been impounded as there are no exigent circumstances existing at this time. (Petn. 8-9.)

As noted in Argument I, supra, Chadwick has nothing to do with automobile searches, but does reaffirm the automobile exception to the warrant requirement. Moreover, even if Chadwick did affect such searches, it does not apply to this search which occurred before the Chadwick decision. Thus, the only question here is whether the trunk search of an impounded vehicle was proper under existing law regarding automobile searches.

Prior decisions of this Court have repeatedly held police may conduct a warrantless search of a vehicle where the police have probable cause to search the automobile and exigent circumstances exist at the time. Moreover, the police may impound a vehicle under these circumstances and search the vehicle later at the police station. (Chambers v. Maroney, supra, 399 U.S. 42, 47-52; Cardwell v. Lewis, supra, 417 U.S. 583, 592-596; Texas v. White (1975) 423 U.S. 67; South Dakota v. Opperman, supra.) Indeed, Texas v. White, supra, and United States v. Chadwick, supra, suggest this Court would now uphold warrantless vehicle searches where there are no exigent circumstances if the police have probable cause to search the vehicle. (See United States v. McLaughlin, supra, at p. 1183; United States v. Robinson (D.C. Cir. 1976) 533 F.2d 578, 586 (conc. opn. of Robb, J.).)

The record in the instant case clearly reveals the police had probable cause to search the vehicle. The Cadillac was parked right behind Mr. Davey's car at the



motel. Mr. Davey saw Decker standing between the Cadillac and Davey's car. Mr. Davey's trunk had been opened and various items from the trunk were found to be missing. The Cadillac was stopped in broad daylight about 15 minutes later. Decker and Penoli were inside and had burglary implements on their persons.

All these facts lead to the reasonable conclusion Decker and Penoli had taken items from Davey's car and had not, as yet, had time to dispose of them. Thus, it was reasonable to conclude they were using the vehicle to hide stolen merchandise. Under these circumstances, the police had probable cause to search the vehicle for the stolen items. Exigent circumstances also existed at the time of the stop as the vehicle could have been removed by an unknown accomplice if the police had not seized it. (People v. Laursen (1972) 8 Cal.3d 192, 201, fn. 8; People v. Hill (1974) 12 Cal.3d 731, 750-753; People v. Dumas (1973) 9 Cal.3d 871, 885; Chambers v. Maroney, supra; Texas v. White, supra.)

Under these circumstances the subsequent search of the trunk at the station was proper. (Texas v. White, supra; Chambers v. Maroney, supra; People v. Hill, supra.)

## III

## CALIFORNIA DOES NOT HAVE A SEPARATE INSTRUMENTALITY DOCTRINE WHICH VIOLATES THE FOURTH AMENDMENT RIGHTS OF PERSONS

Petitioner's final argument is somewhat confusing. In essence, he contends California has developed a doctrine which has

not been sanctioned by this Court. This doctrine permits police to search a vehicle as an instrumentality of a crime in violation of an individual's Fourth Amendment rights.

As noted earlier this Court has repeatedly upheld warrantless searches of vehicles based upon probable cause and exigent circumstances. In interpreting these rulings, California courts have discussed various ways of determining whether the police have probable cause to search a vehicle. In these discussions the courts have concluded probable cause to search exists where the vehicle is an instrumentality of the crime. (People v. Laursen, supra, 8 Cal.3d 192, 201; People v. Hill, supra, 12 Cal.3d 731, 751.) This doctrine is presumably based on the compelling logic that where a car is an instrumentality of a crime, i.e., used as a getaway car or to otherwise perpetrate the crime, it is likely the vehicle will contain evidence of the crime or contraband.

Accordingly, the instrumentality doctrine is nothing more than a way of determining probable cause to search a vehicle. Its existence, thus, does not impinge on any right to privacy which may exist in an automobile. This Court has held there is no right to privacy in moving vehicles where police have probable cause to search the vehicle. (Chambers v. Maroney, supra; Texas v. White, supra.)4/

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4. Petitioner contends if the instrumentality doctrine had been used in Chadwick the footlocker could have been searched. However, contends petitioner, such a result would have been inconsistent with Chadwick. This contention is a non sequitur. Chadwick did not involve an automobile search as the



## CONCLUSION

For the foregoing reasons respondent requests the petition for writ of certiorari be denied.

Respectfully submitted,

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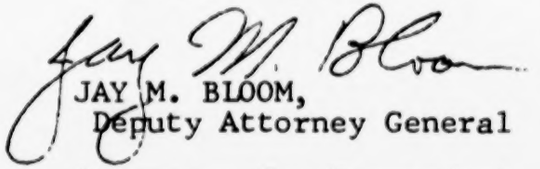

JAY M. BLOOM,
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4. (Continued)

government did not even contend the brief contact the locked trunk had with a car turned the case into an automobile search case. Moreover, Chadwick obviously did not involve a situation where the vehicle was an instrumentality of the crime. Thus, nothing in Chadwick has anything to do with the instrumentality doctrine.

# APPENDIX A

# UNITED STATES CONSTITUTION

## AMENDMENT IV

### Seizures, Searches and Warrants

[Section 1.] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Proposed September 25, 1789; ratified December 15, 1791.

# CALIFORNIA STATUTES

## Penal Code Sections

§ 459.

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

§ 466.

Every person having upon him or in his possession a picklock, crow, keybit, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above named so that the same will fit or open the lock of a building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.

§ 496.

1. Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may



be, may, if the value of the property does not exceed two hundred dollars ($200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year. . . .

§ 995.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

§ 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure . . . .

# APPENDIX B

[Filed June 28, 1978]

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

2D CRIM. NO. 31380
(Sup.Ct.No. 10226)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS LEROY DECKER and
RAYMOND JOSEPH PENOLI,

Defendants and Appellants.

THE COURT*

Codefendants, Thomas Leroy Decker and Raymond Joseph Penoli, pleaded guilty to second degree burglary (Pen. Code, § 459). Prior thereto they unsuccessfully moved to suppress evidence (Pen. Code, § 1538.5). They appeal, contending in essence, that

*Before Klein, P.J., Cobey, J., and Allport, J.

(1) their initial detention was illegal, (2) they were arrested without probable cause, and (3) the warrantless search of their vehicle after it was impounded was unlawful.

We review the evidence in the light most favorable to the order denying suppression as is required by the usual rule governing appellate review. (People v. James, 19 Cal.3d 99, 107.) On October 10, 1976, at about 10:00 a.m. Warren Davey was standing on the second floor balcony outside of his room at the Spyglass Motel in Pismo Beach when he noticed that appellants' Cadillac automobile was parked perpendicular to the rear of his car. The right front door of the Cadillac was open opposite the trunk of Davey's car and appellant Decker was standing between the two cars, his hands holding the trunk lid which was opened about four inches.

As Davey looked on, Decker glanced up at him standing 20 feet above and immediately closed the trunk lid. After briefly speaking with appellant Penoli, who was seated behind the steering wheel of the Cadillac, they drove away. Davey then checked the contents of the trunk and discovered his camera and camera case, his wife's coat and an overnight case were missing. He had locked these items in the trunk of his car the night before.

Davey telephoned the local police and reported, "I believe someone had gotten into my trunk and taken my camera case." He described the car and its occupants as "a white Cadillac, El Dorado, with a black top and had two men inside, and one of them was six feet and light hair, light sandy hair, and the other one was roughly six feet and had dark hair." Shortly thereafter Pismo Beach Police Officer David Griffith received a bulletin over his police radio to



"be on the lookout for a black over white Cadillac that had just been involved in a 459 auto at Spyglass Motel . . . [containing] two male occupants . . . one with light-colored hair."

At approximately 10:30 a.m. Officer Griffith observed appellants in the Cadillac heading south from Pismo Beach on Interstate Highway 101. He ordered Decker, who was driving, to stop and exit the car. At this time Officer Gary Holt arrived at the scene and alerted the police dispatcher to summon the victim, Davey, to the location. Approximately five or ten minutes later Davey arrived, identified himself to Officer Holt, and made a positive identification of appellants and their car. Appellants were arrested and searched[1] and their car was impounded at a nearby gas station. One hour later Officer Holt had a locksmith open the trunk and recovered Davey's property.[2]

The contention that Officer Griffith had insufficient information to detain appellants is meritless. In the instant matter, Officer Griffith obtained knowledge through "official channels" that a burglary had taken place a short time before observing appellants on the highway. He knew the general description of the suspects and the car used by them.

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1. A search of Decker's jacket pocket uncovered a set of altered automobile keys used for "picking" locks on cars.

2. The locked glove box was also opened and searched but no seizable evidence was found therein.

From this set of facts, Officer Griffith could "reasonably entertain a sufficient good faith suspicion to warrant a detention of the occupants for investigative purposes." (People v. Flores, 12 Cal.3d 85, 91; People v. Waters, 30 Cal.App.3d 354, 361.) Further, since Griffith was the first officer on the scene to confront appellants, he was justified in requiring Decker to alight from the car as a safety precaution. (See People v. Ortega, 2 Cal.App.3d 884, 892; People v. Figueroa, 268 Cal.App.2d 721, 726-727.)

Appellants' argument that the victim was an unreliable informant and the information he supplied was insufficient to constitute probable cause to arrest them is equally meritless. Prior to arresting appellants, Officer Holt had the victim, Davey, summoned to the detention location. When he arrived the victim provided Officer Holt with a detailed description of the crime and made a positive identification of the car and appellants. Mr. Davey, as a citizen-informant, is presumed to be reliable and there is nothing contained in this record to challenge his credibility. (People v. Ramey, 16 Cal.3d 263, 269.) We find the information supplied by Davey amply supports the court's implied finding that probable cause to arrest appellants existed. (See People v. Ramey, supra, at pp. 269, 270; People v. Amos, 70 Cal.App.3d 562, 566-567.)

Lastly, appellants contend that the warrantless search of their impounded vehicle was unlawful. Here appellants were stopped on the highway driving away from the city only one-half hour after the burglary was reported. Under these circumstances the officers had reason to believe appellants had not yet disposed of the stolen goods and the items were probably concealed



somewhere in the car. (See People v. Dumas, 9 Cal.3d 871, 885.) They were then entitled to conduct an immediate warrantless search of all areas of the car. (People v. Laursen, 8 Cal.3d 192, 201.) The fact that the trunk was opened and searched only after appellant's car was removed from the open highway and impounded does not invalidate the search. (People v. Hill, 12 Cal.3d 731, 751 and cases therein; People v. Stafford, 29 Cal.App.3d 940, 947.)

The judgments[3] are affirmed.

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THE OFFICIAL REPORTS

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3. Appellant Decker was granted probation, an order deemed a judgment for appellate purposes. (Pen. Code, § 1237.)

# APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 24 1978 San Diego

*I have this day filed Order*

CR. D.

No.

Entered by

Date

**HEARING DENIED**

*In re:* 2 Crim. *No.* 31380

People

*vs.*

Decker and Penoli

78DA0137
MV
8-24

*Respectfully,*

G. E. BISHEL
*Clerk*

87871-877 1-78 .M 081